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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1994

ZELL MILLER, *et al.*,
Appellants,
v.
DAVIDA JOHNSON, *et al.*,
Appellees.

LUCIOUS ABRAMS, JR., *et al.*,
Appellants,
v.
DAVIDA JOHNSON, *et al.*,
Appellees.

UNITED STATES OF AMERICA,
Appellant,
v.
DAVIDA JOHNSON, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF A. J. PATE AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

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65 pp

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

A. J. Pate hereby respectfully moves for leave to file the attached brief *amicus curiae* in these cases in support of appellees, as provided in Rule 37 of the Rules of this Court. The consent of the counsels of record for all appellants has been obtained. Consent of counsel for the appellees has been requested but not obtained.

A. J. Pate is a private citizen, who, on his own time and at his own expense, became deeply involved in a quest for fair congressional redistricting for the State of Texas for the 1990's. However, the Texas Legislature produced the most extremely gerrymandered plan in the history of the United States. This brief is a continuation and expansion of that quest, seeking to restore the concept of representation to its original and nobler intent, principally through the use of traditional districting standards.

Appellees will appropriately concentrate on the specific facts of their own case. However, in the brief attached to this motion, A. J. Pate treats the issue in its broader aspects and ultimate impact, including significant considerations which he believes the Court should take into account. It is his hope that this contribution will assist the Court in setting the issues presented by these cases in a broader context for a comprehensive review of the grave import and consequences that the Court's decision may have on our republican form of government.

For these reasons, A. J. Pate respectfully requests the Court to grant this motion for leave to file his attached brief, with the highest of motives, as a true friend of the Court.

Respectfully submitted,

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March 20, 1995

BRIEF OF A. J. PATE AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

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INTEREST OF THE *AMICUS CURIAE*

Because of the interest of the *amicus curiae* in the preservation of our republican form of government, the *amicus curiae* became very involved in the 1990 cycle of the congressional redistricting process in the State of Texas, testifying before various legislative committees and co-authoring a redistricting plan for the State. This plan received considerable attention during the hearing of *Vera v. Richards*, 861 F. Supp. 1304 (see pp. 1330 and 1342), a case similar to these cases, also involving racial gerrymandering.

This brief makes points, advances legal theories, and cites authorities which are highly relevant, but unlikely to be discussed or mentioned by the parties in these cases.

SUMMARY OF ARGUMENT

After surveying thirty years of redistricting decisions by the Court, all essentially gerrymandering cases, the goal of "fair and effective representation" appears as elusive as ever. Now, the Court once more must decide on the latest variation on the gerrymandering theme.

While the Court in this instant case appropriately should rule in favor of the appellees, that racial gerrymandering is unconstitutional, a narrow ruling limited to this specific issue would only open up another whole new area for seemingly endless litigation, contentious and divisive. What demagogic schemes and misguided legislation, corrosive to our republican form of government, would be contrived in reaction to such ruling? What bizarre and limitless mutations of the gerrymander, now unforeseen, would present the Court with future perplexities?

However, the Court has another choice - to cut the Gordian knot restraining fair and effective representation by declaring gerrymandering unconstitutional *per se*. This clear-cut ruling would be augmented by the Court's suggestion of judicially manageable standards, which, if followed, would establish a

prima facie presumption of constitutionality.

This brief strongly urges the Court to adopt the consistent, logical, and neutral principle offered by the latter choice. Such a decision would be a natural culmination for the Court since thirty years of judicial restraint have only resulted in ever more extreme gerrymanderings. This would not be a new concept for the Court. Justice Stevens, in *Karcher v. Daggett*, 462 U.S. at 745-765, and Justice Powell, in *Davis v. Bandemer*, 478 U.S. at 161-185, make explicit and very persuasive arguments for the unconstitutionality of gerrymandering *per se*, contending that all forms should be judged by the same constitutional standards.

There is ample remedy in the Constitution to ban the gerrymander. Beside the Equal Protection Clause of the Fourteenth Amendment offered by Justices Stevens and Powell, gerrymandering also violates the Due Process Clause through the unfairness of a governmental process and related conflicts of interest; the Guarantee Clause, Article IV, Section 4, by abridging the political power of the people assured by our republican form of government; the First Amendment by abridging freedoms of political speech and association; and Article I, Section 2, by depriving the people of the right to choose fair and effective representation for their common interests.

This decision would restore original intent to the redistricting process by providing fair and effective representation for the people, equally for all groups in their communities of interest. Judicially manageable standards could also provide a principled resolution to most collateral issues relating to districting and the electoral system (see Appendix B *infra*).

ARGUMENT

I.

Reapportionment of congressional seats is fundamentally a division of political power between the states. In turn, re-

districting is a division of political power within the states. Since redistricting is a zero-sum process, to the extent that redistricting is not conducted fairly, some groups or persons must necessarily gain at the expense of others whose voting power has thus been diluted.

Reapportionment is an objective process in the U. S. Congress based on an established formula. By stark contrast, the redistricting process for both state and federal districts, done by the state legislatures in most states, is extremely subjective with virtually no constraints on how the district lines are drawn. In the legislatures, redistricting is a highly partisan process, a spoils system with little or no regard for democratic ideals and consideration of the interests of the people. This corruption of the political system is achieved through gerrymandering, which has been defined by *Black's Law Dictionary,* Sixth Edition (West Publishing Co., 1990), p. 687, as: "A name given to the process of dividing a state or other territory into the authorized civil or political divisions, but with such a geographical arrangement as to accomplish an ulterior or unlawful purpose, as, for instance, to secure a majority for a given political party in districts where the result would be otherwise if they were divided according to obvious natural lines."

The sole purpose of gerrymandering is to give more weight to certain votes than to others in order to assure predetermined results for at least a decade. Gerrymandering is the most undemocratic and unrepublican (and thus unconstitutional) of deeds in our political system, yet incredibly is presented to the people as law, official acts of state government!

Despite the many "apportionment" cases over recent decades, gerrymanderings have only grown apace. In fact, the extreme application of the "one person, one vote" rule has

only provided a convenient cover for gerrymandering.[1] It is instructive to compare the illustrations of gerrymandering provided by Justice Frankfurter in *Coleman v. Green*, 328 U. S. at 560-563 ("fair samples of prevailing gerrymanders" in 1946), to California's redistricting in the 1980 cycle and Texas' redistricting in the 1990 cycle.

Gerrymandering often results in reduced political competition through one-party dominance in elections which are little more than *pro forma* exercises, leading inexorably to declining voter interest and participation, increasing public cynicism, and an alienation of the represented from the representative. Gerrymandering, in a gross mockery of the system, turns the concept of representation on its head; representatives select the people they wish to represent, rather than the people choosing whom they wish to represent them.

Gerrymandering has been called the moral (and functional) equivalent of stuffing the ballot box. The bizarre shapes of districts fragment existing state and local political units and communities of interest at will, disconnecting the people from the process and their representatives. The multi-layered cycles of gerrymandering are self-perpetuating without practical hope of legislative redress.

Gerrymandering trivializes elections by predetermining results for up to ten years before any votes are even cast. It does not allow a coherent and mutable expression of the will of the people, which obviously thwarts the purpose of democracy and representative government.

Our republican form of government is a social contract between the people, who have the ultimate and permanent power, and their representatives, whom the people entrust as temporary custodians of their diverse interests. This contract presupposes that these elected representatives will always

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[1]See Chief Justice Warren's prescient warning in *Reynolds v. Sims*, 377 U. S. at 578-579. Similar concerns have also been expressed by Justice White, *Kirkpatrick v. Preisler*, 394 U. S. at 555; Justice Harlan, *op. cit.* at 551; and Justice Powell, *Davis v. Bandemer*, 478 U.S. at 170-173.

perform their fiduciary responsibilities honorably and in good faith on behalf of the people to serve their best interests.

The interests of the people are never more at risk than when these same representatives, in an intrinsic and direct conflict of interests, must redraw the boundaries of their own districts. This same conflict of interests, though sometimes indirect, applies to congressional districts as well. In these conflicts, the interests of the people always lose. Gerrymandering, in a betrayal of public trust, puts the illegitimate self-interests of the few controlling the process above the legitimate interests of the many, the people. To add insult to injury, the politicians in control of state government use public funds to pay the costs of subverting the redistricting process to their own self-interests, and subsequently use more public funds if necessary to defend their chicanery against its immediate victims. In any other context, such actions would be criminal - using a position of public (or even private) trust and its funds for self-aggrandizement, in terms of wealth or power, or both.

Gerrymandered districts are sometimes excused by the judiciary as justified by "legitimate state interests" or "rational state policies". What legitimate state interests can there be in gerrymandering? The "state" must not be confused with the politicians who may be in control of the state government at a particular time; rather, the state is the embodiment of the people. The only legitimate state interest in redistricting is to provide fair and effective representation for the people and their interests.

When the right to vote is tampered with, it is not only a threat to the legitimacy of the legislative bodies, but to the legislation enacted as well. Such questions of legitimacy could even extend to the Presidency in the event of a President being chosen by a House of Representatives so constituted (and to subsequent judicial appointments), when no majority was obtained in the Electoral College. Thus, gerrymandering could potentially taint the legitimacy of all three branches of the federal government!

II.

The principal engines driving gerrymandering are the powerful interrelated forces of partisan politics and entrenched incumbency, neither more than an ill portent when the Constitution was written.

Law has been described as "the principles of the text, whether Constitution or statute, as generally understood at the enactment".[2] In this light, the nature of the political system and of representation, contemporaneous with the writing of the Constitution, should be briefly examined, providing insight into the conceptual matrix of the men who inspired, framed, approved, and implemented the Constitution.

At the writing of the Constitution, the potential development of political parties was a matter of great concern and a subject of dire warnings. The words "faction" and "party" seem to have been used rather interchangeably in these warnings and apparently referred to some modern combination of political parties and special interest groups.[3] In the course of time, political parties did develop, and special interest groups are now a ubiquitous part of the political scene. The fears and warnings of Madison and Washington have been fully realized, at least to the extent of the anti-republican practice of gerrymandering.

Entrenched incumbency was also considered undesirable, with term limitations often imposed, as evidenced by the Virginia Declaration of Rights (*ibid.*, pp. 311-313), adopted unanimously on June 12, 1776; this document lent wording to the Declaration of Independence and much substance to the Bill of Rights, incorporated as the first ten amendments of the Constitution. Also, see the Articles of Confederation, Article

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[2]Robert H. Bork, *The Tempting of America* (The Free Press, 1990), p. 5.

[3]See Madison, *The Federalist* No. 10, pp. 54-59, and George Washington's Farewell Address, *The Guide to American Law*, Vol. 11 (West Publishing Co., 1985), pp. 375-376.

V, and the Pennsylvania Constitution of 1776 (*ibid.*, pp. 337-344 and 320-331).

In practice, these sentiments were widely held and regarded. "Throughout the entire first century of [Congress'] history, members entered and left Congress with a frequency that stands in sharp contrast with modern standards. During this period, the median term of service in the House of Representatives fluctuated between two and four years, and the proportion of members who served more than four terms never exceeded ten percent."[4]

The basic political unit of representation for the colonies and succeeding states was the county. Additionally, in the colonial and state lower chambers, representation sometimes would be provided variously to sub-units of the county, *i.e.*, towns, cities, parishes, and "places". In the upper chambers, counties were used almost exclusively, either singly or in districts composed of multiple counties. Comparing the state constitutions before the Federal Constitution (most dated from 1776 to 1778) to those next following after adoption of the Constitution in 1788 shows virtually no change in the basic units for representation.[5]

The Ordinance of 1787,[6] commonly called the Northwest Ordinance, enacted by the Continental Congress on July 13, 1787, during the Constitutional Convention, provided for a general assembly; the inhabitants were authorized "to elect representatives from their counties or townships to represent them in the general assembly" (*ibid.*, p. 347).

The Missouri Compromise (*ibid.*, p. 388), by which

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[4]Jack N. Rakove, "The Structure of Politics at the Accession of George Washington", *Beyond Confederation: Origins of the Constitution and American National Identity*, Richard Beeman *et al.* (University of North Carolina Press, 1987), p. 272.

[5]See *The Federal and State Constitutions, Colonial Charters, and Other Laws of the United States*, Ben. Perley Poore, ed. (Government Printing Office, 1878).

[6]*Guide to American Law*, *op. cit.*, pp. 345-350.

Congress admitted Missouri into the Union in March 1821, provided in Section 3 that voters were to "choose representatives to form a convention, who shall be apportioned amongst the several counties", which were then listed with the number of representatives designated for each county. The purpose of the convention was to form a state constitution and government.

The latter two documents are particularly noteworthy because both were enacted by Congress, one under the Articles of Confederation and one under the Constitution, and both prescribed systems of representation for territories based on counties. These were obviously Congress' practical applications (if not models) of its concept of republican government, since both documents also specifically required that the state constitutions and governments to be formed "shall be republican".[7]

Even today, after more than two centuries, the county is still the principal sub-unit of government within the states, and logically there is no reason it should not regain its historic role in the districting process. And not simply because it would be a restoration of original intent, but because, now as then, it is also the wisest way to help ensure fair and effective representation for the people in their communities of interest.

III.

Mason, in Article VI of the Virginia Declaration of Rights, stated that electors and their representatives should have "sufficient evidence of permanent common interest with, and attachment to, the community".[8] In *The Federalist* No. 10, p. 55, Madison wrote in similar words concerning factions

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[7] *Ibid.*, pp. 349 and 389. Also, see Madison, *The Federalist* No. 39, pp. 254-255, and *The Papers of James Madison*, Vol. 8, Robert A. Rutland, ed. (University of Chicago Press, 1973), p. 354.

[8] *Guide to American Law, op. cit.*, p. 312. Also, see Madison, *The Federalist* No. 56, pp. 377 and 380-381, and Hamilton, *The Federalist* No. 71, p. 479.

which are "adverse to the rights of other citizens, or to the permanent and aggregate interests of the community", linking individual rights with community interests.

In a republican form of government, if representation is to have any intrinsic meaning at all, it must be based on organic groupings of socially-cohesive persons with common sets of interests within geographically-definable areas.[9]

The representation of interests in relation to place has been noted by several Justices. Justice Harlan in *Reynolds v. Sims*, 377 U.S. at 623-624, in response to another Justice's comment that "people, not land or trees or pastures, vote", stated: "But it is surely equally obvious, and, in the context of elections, more meaningful[,] to note that people are not ciphers and that legislators can represent their electors only by speaking for their interests - economic, social, political - many of which do reflect the place where the electors live. The Court does not establish, or indeed even attempt to make a case for[,] the proposition that conflicting interests within a State can only be adjusted by disregarding them when voters are grouped for purposes of representation." Justice Stewart, in *Lucas v. Colorado General Assembly*, 377 U. S. at 750, stated: "[L]egislators do not represent faceless numbers. They represent people, or, more accurately, a majority of the voters in their districts - people with identifiable needs and interests which require legislative representation, and which can often be related to the geographical areas in which these people live. The very fact of geographic districting, the constitutional validity of which the Court does not question, carries with it an acceptance of the idea of legislative representation of regional needs and interests." Justice Powell in *Davis v. Bandemer*, 478 U.S. at 176 (part III, section B), discusses at length the adverse impact of districting which lacerates communities of interest.

Providing equal political rights for all communities of

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[9]See Edmund S. Morgan, "Government by Fiction: The Idea of Representation", *The Yale Review*, Spring 1983, pp. 326-328 and 336.

interest is a principled approach to representation: How can it be recognized that group or collective rights are in fact important in the political process, yet allow those rights to be claimed only by certain groups while simultaneously denying the same constitutional protection to others? Justice Black, in *Colegrove v. Green*, 328 U. S. at 571, wrote: "For legislation which must inevitably bring about glaringly unequal representation in the Congress in favor of special classes and groups should be invalidated, 'whether accomplished ingeniously or ingenuously.'" Treating all communities the same under the law puts emphasis on the unifying dynamics within each particular community, as opposed to the emphasis placed on the divisions between communities which is the unfortunate consequence of singling out specific protected groups for favored treatment.

Districting based on communities of interest would result in a more effective political participation (in both broad and partisan aspects), a stable electorate capable of corporate effort, and a sense of rational connection between members of the community, its representatives, and the political system. A study published in May 1986 documented that "Familiarity with congressional candidates is greater the less a community is divided among multiple districts." The study concluded that: "[A] specific contribution [is] made by the preservation of natural communities. ... [T]he effect is real enough ... and large enough that by itself it suggests that preservation of community boundaries merits more attention than the Court has heretofore given it. ... [I]t must now be said that there is some genuine, empirical basis on which to press for greater consideration of natural community boundaries in the redistricting process."[10]

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[10]Richard G. Niemi, Lynda W. Powell, and Patricia L. Bicknell, "The Effect of Community-Congressional Districting Congruity on Knowledge of Congressional Candidates", *Legislative Studies Quarterly*,, May 1986, Vol. XI (University of Iowa), pp. 198-199. Also, see *Karcher v. Daggett*, 462 U.S. at 787 (note 3).

In a resumption of their historical role and significance since colonial days, counties should be the basic political unit for defining communities of interest. In rural areas, a number of affinitive counties may need to be combined to attain appropriate district populations with broad common interests (macro communities of interest), often based on geographic features or agricultural and ranching activities. In urban/suburban areas, counties may need to be subdivided into districts with interests more narrowly focused (micro communities of interest), usually neighborhoods based on race, ethnicity, socio-economic class, or industry.

Voting rights are individual rights, but they can be rendered virtually meaningless if fair and effective representation is not provided for interests collectively held in a community of interest. Indeed, the republican concept of representation by definition considers the electorate not as individuals but as members of groups with common interests participating collectively. In *Lucas v. Colorado General Assembly*, 377 U. S. at 749, Justice Stewart wrote: "Representative government is a process of accomodating group interests through democratic institutional arrangements. ... Appropriate legislative apportionment, therefore, should ideally be designed to insure effective representation ... of the various groups and interests making up the electorate." As Justice Powell wrote in *Davis v. Bandemer*, 478 U.S. at 167: "The concept of 'representation' necessarily applies to groups: groups of voters elect representatives, individual voters do not." (And the obvious might be added: voters are represented collectively, not individually.) This recognition of collective representation only enhances rather than diminishes the value of an individual vote.

Individual voting rights are inextricably linked with collective or group voting rights, "the essential rights of the community",[11] whether in terms of equal weighting or equal

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[11]Hamilton, *The Federalist* No. 60, p. 408.

meaningfulness. The perceived tension between these rights is both artificial and illogical. Of what value is a vote of equal weight if its use is meaningless? Individuals gain political power only through collective action in the political process. Group viability is reliant upon shared or common concerns, interests, and values, *i.e.*, communities of interest.

Justice Powell, in *Karcher v. Daggett*, 462 U.S. at 787, stated: "A legislator cannot represent his constituents properly - nor can voters from a fragmented district exercise the ballot intelligently - when a voting district is nothing more than an artificial unit divorced from, and indeed often in conflict with, the various communities established in the State." And, at 788, concluded: "I do believe ... that the constitutional mandate of 'fair and effective representation' ... proscribes apportionment plans that have the purpose and effect of substantially disenfranchising identifiable groups of voters." [References and footnotes deleted.]

IV.

It is clear that gerrymandering is antithetical to fair and effective representation by the denial of equal representation for the various discrete, insular, and identifiable groups who share common interests within their communities. It is equally clear that gerrymandering should be unconstitutional *per se*.[12] The practice has become so pervasive and imbedded into the political system that it is virtually institutionalized. It is so pernicious to representative government and so corrosive in its effect on the democratic process that it should no longer be tolerated by the judiciary. There is an irreconcilable conflict of interest between political self-interests and the right of the people to fair and effective representation. The system is institutionally incapable of internal change, and it is virtually impervious to

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[12]Justice Stevens, in *Karcher v. Daggett*, 462 U.S. at 745-765, and Justice Powell, in *Davis v. Bandemer*, 478 U.S. at 161-185, make compelling cases for the unconstitutionality of gerrymandering *per se*.

external change because it is self-perpetuating. Since career politicians are well-versed in the complex machinations of redistricting and, using the people's own money, control the entire process as well, the people are overwhelmingly disadvantaged.[13] The process, at its best, is arcane and disjointed, extending over a number of years.

The Court's restraint and three decades of related decisions have failed to result in the achievement of fair and effective representation.[14] Rather then ameliorating with time and despite the Court's efforts (indeed, some have said in part due to), gerrymandering has only become less subtle and more efficient, aided exponentially by accelerating computer technologies.[15] This progression can be quickly confirmed by comparison of the congressional districts for California in the 1980 cycle to those for Texas in the current cycle.

Why should a cabal of political aristocrats, state and federal legislators, be allowed to pervert with impunity the redistricting process for their own petty self-interests, demonstrating contempt for democratic ideals, republican principles, judicial restraint, and ultimately the rights of the

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[13]In California, one of the few states where voters can attempt direct action through ballot initiatives and referenda, several such efforts have met relentless opposition by politicians. Then even when one effort was successful, the referendum was effectively overturned by a partisan state Supreme Court which allowed the offending legislature to redraw district lines basically the same as those rejected by the people by a vote exceeding 60%. See T. Anthony Quinn, *Carving Up California: A History of Redistricting, 1951-1984* (Rose Institute of State and Local Government, Claremont McKenna College) [unpublished manuscript], pp. 54-130 of the section "All Passion Spent: California's 1981-1984 Reapportionment".

[14]See 781 F. Supp. at 402 (1991).

[15]*E.g.*, the *Congressional District Atlas* for the 1990 redistricting cycle is contained in two volumes, each larger than the single volume for the 1980 cycle. The 1990 district maps for Texas required 177 pages, compared to only 16 for 1980; North Carolina required 54 pages, compared to only 3 for 1980. U.S. Bureau of the Census, *Congressional District Atlas, 103rd Congress of the United States*, Vol. 2, U. S. Government Printing Office (1993).

people? Should the judiciary respect those interests, if at all, above the legitimate common interests of the people?[16]

Regarding the issue of determining representation for the states, Mason, in the constitutional debates, arguing for "some permanent and precise standard as essential to ... fair representation", said: "From the nature of man we may be sure, that those who have power in their hands will not give it up while they can retain it. On the contrary we know they will always when they can rather increase it."[17] Madison, in *The Federalist* No. 51, p. 348, wrote: "But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions." [Emphasis added.]

The Court should now exercise an "auxiliary precaution" by declaring gerrymandering unconstitutional *per se*, thus obliging the state legislatures to control themselves in the redistricting process.

V.

As previously cited, *Black's Law Dictionary* defined gerrymandering as "the process of dividing a state or other territory into the authorized civil or political divisions, but with such a geographical arrangement as to accomplish an ulterior or unlawful purpose". Gerrymandering may be further defined functionally as: "Maldistricting by biased and

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[16]See 781 F. Supp. at 409 and Hamilton, *The Federalist* No. 78, p. 522.

[17]*Notes of Debates in the Federal Convention of 1787 Reported by James Madison* (Ohio University Press, 1966), p. 266.

self-interested persons using an unfair process to debase the political influence or power, whether by intent or effect, of certain discrete, insular, and identifiable groups of voters in choosing representation for their common interests; most commonly used to describe state legislative actions, as defined above, using public funds to finance the process with its results established by state law."

All the major redistricting decisions of the Court have been essentially gerrymandering cases under either definition noted above. These cases shared the common characteristics of involving gerrymanderings which denied fair and effective representation for communities of interest,[18] accomplished through unfair and discriminatory manipulation of the political process.[19] Since the affront to the Constitution is the same and the cause is the same, then the constitutional redress should be the same. This redress should be based on the consistent, logical, and neutral principle that all gerrymanderings are unconstitutional *per se*.

The following provisions in the Constitution assert to the unconstitutionality of gerrymandering: the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment, the Guarantee Clause in Article IV, Section 4, the First Amendment, and Article I, Section 2.

Due Process Clause

Gerrymanderings are the products of an unfair political process which is beyond any reasonable expectation of the

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[18]*Davis v. Bandemer* is an exception. Political parties are not communities of interest; they are neither discrete nor insular nor permanent (nor identifiable except episodically). That this is also the most ineffectual of these cases is perhaps not mere coincidence.

[19]These characterizations are supported by Justice Stevens' (then circuit judge) comments in *Cousins v. City Council of City of Chicago*, 466 F. 2d at 847, specifically regarding the *Baker* and *Gomillion* decisions. At 853, Justice Stevens wrote: "I believe all gerrymandering should be judged by the same constitutional standard."

people to effectively change. This hopelessly irreformable corruption of the redistricting process is a violation of due process, a requirement for procedural fairness. If the process is not legitimate nor fair, then what flows from it is of highly questionable legitimacy or fairness. The Due Process Clause requires the substance of any law to be implemented through fair procedures.

Justice Powell, in *Davis v. Bandemer*, 478 U.S. at 173, wrote that, in testing "redistricting plans against constitutional challenges", "[o]ther relevant considerations include the nature of the legislative procedures by which the apportionment law was adopted ... which bear directly on the fairness of a redistricting plan". He added, at 175: "A court should look first to the legislative process by which the challenged plan was adopted." The text following made it clear that "adopted" included mapmaking.

Equal Protection Clause

Justice Stevens in *Karcher v. Daggett*, 462 U.S. at 745-765, makes a powerful argument for the unconstitutionality of gerrymandering. He bases this opinion on the Equal Protection Clause of the Fourteenth Amendment: "[P]olitical gerrymandering is one species of 'vote dilution' that is proscribed by the Equal Protection Clause." (At 744; also see related note 1.) He further details this assertion in Part I of his opinion (at 745-750). The "guarantee of equality of representation ... is firmly grounded in the Equal Protection Clause of the Fourteenth Amendment." (At 747; also see related note 5.) "The Equal Protection Clause requires every state to govern impartially. When a state adopts rules governing its election machinery or defining electoral boundaries, those rules must serve the interests of the entire community. If they serve no purpose other than to favor one segment - whether racial, ethnic, religious, economic, or political - that may occupy a position of strength at a particular point in time, or to disadvantage a politically weak segment of the community, they violate the constitutional

guarantee of equal protection." (At 748; references omitted.) "There is only one Equal Protection Clause. Since the Clause does not make some groups of citizens more equal than others, its protection against vote dilution cannot be confined to racial groups. As long as it proscribes gerrymandering against such groups, its proscription must provide comparable protection for other cognizable groups of voters as well." (At 749; references omitted.)

Justice Stevens in an earlier opinion, *Mobile v. Borden*, 446 U. S. at 86, had stated that gerrymandering violated the Equal Protection Clause which applied "not merely to gerrymanders directed against racial minorities, but to those aimed at religious, ethnic, economic, and political groups as well. Whatever the proper standard for identifying an unconstitutional gerrymander may be, I have long been persuaded that it must apply equally to all forms of political gerrymandering - not just to racial gerrymandering." Also, in note 7 at 87, he added: "This view is consistent with the Court's Fourteenth Amendment cases in which it has indicated that attacks on apportionment schemes on racial, political, or economic grounds should all be judged by the same constitutional standard."

Justice Powell, in *Davis v. Bandemer*, 478 U.S. at 161-185, also makes a compelling exposition for the unconstitutionality of gerrymandering. In section B of part II at 166-167, he writes: "The Equal Protection Clause guarantees citizens that their State will govern them impartially. In the context of redistricting, that guarantee is of critical importance because the franchise provides most citizens their only voice in the legislative process. Since the contours of a voting district powerfully may affect citizens' ability to exercise influence through their vote, district lines should be determined in accordance with neutral and legitimate criteria. ... The Court's decision in *Reynolds v. Sims* illustrates two concepts that are vitally important in evaluating an equal protection challenge to redistricting. First, the Court recognized that equal protection encompasses

a guarantee of equal *representation*, requiring a State to seek to achieve through redistricting 'fair and effective representation for all citizens.' ... Second, ... the Court plainly recognized that redistricting should be based on a number of neutral criteria, of which districts of equal population was only one." [References omitted.]

Chief Justice Warren, in *Reynolds v. Sims*, 377 U.S. at 565-566, wrote: "[E]very citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies. ... Since the achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment, we conclude that the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators. Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race or economic status ..." [References omitted.]

Guarantee Clause

In *The Federalist* No. 39, Madison discussed the republican government formed by the Constitution and guaranteed to the states: "[T]he general form and aspect of the government [must] be strictly republican. ..." (P. 250.) "[W]e may define a republic to be ... a government which derives all its powers directly or indirectly from the great body of the people ... It is *essential* to such a government that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it ... It is *sufficient* for such a government that the persons administering it be appointed, either directly or indirectly, by the people; ... otherwise every government in the United States ... would be degraded from the republican character." (P. 251.) "Could any further proof be required of the republican complexion of this system, the most decisive one might be found in its absolute prohibition of titles of nobility

... and in its express guaranty of the republican form to each of the [State governments]." (P. 253.)

Madison, in *The Federalist* No. 43, pp. 290-291, discussing the Guarantee Clause, wrote: "In a confederacy founded on republican principles, and composed of republican members, the superintending government ought clearly to possess authority to defend the system against aristocratic ... innovations. ... [W]here else could the remedy be deposited, than where it is deposited by the Constitution? It may possibly be asked, what need there could be of such a precaution ... But who can say what experiments may be produced by the ambition of enterprising leaders ... ? [I]t may be answered, that if the general government should interpose by virtue of this constitutional authority, it will be, of course, bound to pursue the authority."

If states fail to conform to the republican form by providing fair and effective representation for the people, the Court is "bound to pursue the [constitutional] authority", which is the "express guaranty of the republican form".

The government itself, state and federal, must be derived from the people, and not from a "favored class" of it. The federal government has the right to defend the system against "aristocratic innovations" and "the ambition of enterprising leaders". Gerrymandering is an "aristocratic innovation" in which government is derived from a favored class by their dilution of the political power of the people. Career politicians, ruthless in their ambitious and self-interested pursuit of continued office and accumulation of related perquisites, are the modern-day equivalent of aristocrats.

Justice Frankfurter, in *Baker v. Carr*, 369 U. S. at 297, wrote that the case was "in effect, a Guarantee Clause claim masquerading under a different label." At 301, he adds: "Certainly, 'equal protection' is no more secure a foundation for judicial judgement of the permissibility of varying forms of representative government than is 'Republican Form'. ... This, with respect to apportionment, means an inquiry into the theoretic base of representation in an acceptably

republican state. For a court could not determine the equal-protection issue without in fact first determining the Republican-Form issue, simply because what is reasonable for equal-protection purposes will depend upon what frame of government, basically, is allowed. To divorce 'equal protection' from 'Republican Form' is to talk about half a question." And he states further, at 323: "Manifestly, the Equal Protection Clause supplies no clearer guide for judicial examination of apportionment methods than would the Guarantee Clause itself."

Justice Harlan, in *Reynolds v. Sims*, 377 U.S. at 591, referring to the Court's application of the Fourteenth Amendment, writes that "[I]t can, I think, be shown beyond doubt that state legislative apportionments, as such, are wholly free of constitutional limitations, save such as may be imposed by the Republican Form of Government Clause ..."

Referring to the *Luther v. Borden* opinion (7 How. 1) that held the Guarantee Clause nonjusticiable because it involved "political questions"[20], Judge Bork wrote: "Since then, for no very good reason, the Court has held that it may not enforce the clause under any circumstances."[21] Regarding

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[20]Justice Frankfurter, in *Baker v. Carr*, 369 U. S. at 297, note 30, indicates that *Luther* was a partisan political question. He seems to be limiting political questions to those that are partisan, referring again to "partisan politics" at 302 *(ibid.)*. Also, see his opinion in *Colegrove v. Green*, 328 U. S. at 550-556.

[21]Bork, *The Tempting of America, op. cit.*, pp. 85-86. "Federal courts should be loath to read out of the Constitution as *judicially* nonenforceable a provision that the Founding Fathers considered essential to formulation of a workable federalism." 292 F. Supp. at 985. Justice Douglas wrote, in *Baker v. Carr*, 369 U. S. at 242 (note 2): "The statement in *Luther v. Borden* ... that this guaranty is enforceable only by Congress or the Chief Executive is not maintainable." Also, see Arthur E. Bonfield, "The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude", *Minnesota Law Review*, Vol. 46, 1962, p. 523; John Hart Ely, *Democracy and Distrust* (Harvard University Press, 1980), pp. 118-125; and 730 F. Supp. at 234-237.

Is it conceivable that *Luther* (1849) and *Dred Scott* (1857) share a common

Baker v. Carr, he wrote: "The most obviously relevant clause of the Constitution was article IV, section 4 ...[; it] was a case in which the guarantee clause should have been applied precisely because a situation in which the majority is systematically prevented from governing [or a minority's impact on governing is systematically diluted] is not what the Founders meant by a republican form of government."[22]

Chief Justice Warren, in *Reynolds v. Sims*, 377 U.S. at 582, states that "[S]ome questions raised under the Guaranty Clause are nonjusticiable, where 'political' in nature and where there is a clear absence of judicially manageable standards." This statement clearly implies that, if there are judicially manageable standards, the Guarantee Clause is operative and questions raised under it are justiciable if not "political" in nature. Judicially manageable standards are available to prevent gerrymandering as a violation of the Guarantee Clause. [See Part VI and Appendix A of this brief, *infra*.] And the term "political" must be defined: The Constitution is intrinsically a "political" document, thus every constitutional issue is ultimately a "political" question. A distinction must be made between "political" and "partisan". As disdained as partisan political parties were at the writing of the Constitution, it would be impossible to construe any

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genesis - an illegitimate motivation to effectively nullify any constitutional provisions which could potentially be used to justify federal intervention into the internal affairs ("political questions") of the states? This was not an unusual context for the Guarantee Clause. During debates on the admission of Missouri to the Union (1818-1821), abolitionists in Congress cited the Guarantee Clause as empowering or obligating Congress to prohibit slavery in Missouri, since "the existence of slavery in any state is ... a departure from republican principles." Bonfield, *op. cit.*, pp. 531-532.

[22]Bork, *The Tempting of America*, *op. cit.*, pp. 85-86. Justice Douglas wrote, in *Baker v. Carr*, 369 U. S. at 242: "[T]he right to vote is inherent in the republican form of government envisaged by Article IV, Section 4 of the Constitution." Also, see 292 F. Supp. at 984-985.

original constitutional protections or standing for them *per se*. Inter-party conflicts are in fact partisan political questions which should be nonjusticiable (thus, *Davis v. Bandemer* was decided on the wrong basis - *i.e.*, that political parties were harmed, not that the people and their interests were not properly represented).

Justice Brennan, in *Baker v. Carr*, 369 U. S. at 222 (note 4), referring to *Luther v. Borden*, concedes: "[T]he Court plainly implied that the political question barrier was no absolute ..." Justice Frankfurter, *ibid.* at 283-284, warns: "The doctrine of political questions, like any other, is not to be applied beyond the limits of its own logic ..."

The motivation for the one person, one vote rulings of the Court is a concept of substantive equality, an equal weight for each vote. Such a principle would derive more support from a democratic system of government than from republican government. The word "democracy" is not in the Constitution and is mentioned only negatively in *The Federalist*. Ironically, in the name of equally-weighted individual votes, politicians were relieved of any constraints on gerrymandering, and the counter-effect has been the diminution of the value and effectiveness of those votes. Basing these cases on the Guarantee Clause would have assured the value of votes through fair and effective representation, achievable in a republic, which would have incorporated substantially equal-weighting of votes as well. Although the one person, one vote rulings, reflecting concern for individual rights, find their roots in democratic theory, the irony is that individual rights have greater protection in a republic. Madison, *in The Federalist* No. 10, p. 59, stated that, as opposed to a republic, in "a pure democracy ... there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual."

First Amendment

Gerrymandering, in discriminating against identifiable groups, violates the First Amendment by abridging their

freedom of speech and associational rights through fragmentation of communities of interest. Gerrymandering denies individual voters their right to affect the political process by joining with others in the same community to elect representatives for their like interests. Since gerrymandering is an act of state government, a violation of strict governmental neutrality, it produces an unconstitutional interference with the political process, manipulated to unfairly favor or disfavor certain political interests. In effect, it promotes some political speech while muting other, and the broad range of local political activities is stifled or thwarted for affected groups. See Justice Harlan's comments in *N.A.A.C.P. v. Alabama*, 357 U. S. at 460-461.

Justice Black in *Williams v. Rhodes*, 393 U. S. at 30, wrote: "[T]he state laws place burdens on two different, although overlapping, kinds of rights - the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms. We have repeatedly held that freedom of association is protected by the First Amendment. And of course this freedom protected against federal encroachment by the First Amendment is entitled to the same protection from infringement by the States." [Notes omitted.]

Justice Douglas, *ibid.* at 38-39, wrote: "[T]he right to vote - a 'fundamental political right' ... is 'preservative of all rights.' The right of expression and assembly may be 'illusory if the right to vote is undermined'. ... The Equal Protection Clause ... [which] bans any 'invidious discrimination' ... protects voting rights and political groups, as well as economic units, racial communities, and other entities. ... Cumbersome election machinery [as created by gerrymandering] can effectively suffocate the right of association, the promotion of political ideas and programs of political action, and the right to vote." [References omitted.]

Article I, Section 2

Article I, Section 2, which states that "[t]he House of Representatives shall be composed of members chosen ... by the People", is violated by a state legislature which in effect chooses the members of Congress and its own members by means of gerrymandering district lines. Gerrymandering deprives the people of the political power and right to constitute their own legislature, to choose fair and effective representation for their communities of interest.

In *Wesberry v. Sanders*, 376 U. S. 1, Article I, Section 2 was the constitutional basis for one person, one vote mandates in drawing lines for congressional districts. However, in the opinion of the Court, written by Justice Black, at 17-18, Article I, Section 2 also had broader relevance: "It is not surprising that our Court has held that this Article gives persons qualified to vote a constitutional right to have their votes counted. Not only can this right to vote not be denied outright, it cannot, consistently with Article I, be destroyed by alteration of ballots, ... or diluted by stuffing of the ballot box ..." [References omitted.] In *Colegrove v. Green*, 328 U. S. at 570-571, Justice Black wrote: "The policy is that which is laid down by all the constitutional provisions regulating the election of members of the House of Representatives, including Article I which guarantees the right to vote and to have that vote effectively counted: All groups, classes, and individuals shall to the extent that it is practically feasible be given equal representation in the House of Representatives, which, in conjunction with the Senate, writes the laws affecting the life, liberty, and property of all the people." (Also, see 781 F. Supp. at 401-410.)

VI.

If gerrymandering is declared unconstitutional *per se*, then two questions follow: (1) Who will be responsible for the redistricting process?; (2) How will gerrymandering be precluded?

To the first question, the Court has consistently and

appropriately held that redistricting is a political process which is the responsibility of the state legislatures under Article I, Section 4 of the Constitution. The unconstitutionality of gerrymandering would not change this responsibility.

The issue is not whether redistricting should be a political process or whether it should be the duty of state legislatures. Rather, the issue is simply that the process must be fair, that it must honor the right of the people to fair and effective representation.

Redistricting is a political process, but it does not have to be, nor should it be, a partisan political process, just as it was a non-partisan process at the creation of our republic. Because of its political impact, the process must be as neutral as possible, protecting the interests of the people. Redistricting should be analogous to reapportionment; reapportionment of representation between the states is a purely neutral process in execution, although it has very substantial political consequences.

The importance of the role of the state legislatures in redistricting has been significantly compromised and diminished over the last several decades. Because of the failure of the legislatures to comply with constitutional standards, deliberately or inadvertently, the judicial system has become heavily involved in the process. Nearly half of the current congressional districts have been impacted by court order, not even including the districting changes forced by the Justice Department under the Voting Rights Act. Additionally, there has been a continuing importunate encroachment by federal representatives in the redistricting process.

This sweeping engagement of the courts heightens the risk of jeopardizing the neutrality of the judiciary, or even of its corruption, perceived or actual, through politicization. There are some disturbing indications that this eventuality may have

already begun.[23] It would be a sad day indeed for this republic if the same public cynicism and distrust of the legislatures should ever be extended to the judiciary. Conversely, a decision by the Court to ban gerrymandering would be widely hailed as a restoration of fairness to the political system, enhancing the Court's public esteem.

The encroachment of federal representatives into the workings of the state legislatures also has disturbing aspects of conflicts of interest. Federal legislators have vested interests in perpetuating gerrymandering as direct beneficiaries, and are often co-conspirators in its planning and implementation as well.[24]

If appropriate neutral standards in the redistricting process were followed, there could be a full and untrammeled resumption of the function by state legislatures, where it belongs, without outside pressures or intervention.

To the second question then, gerrymandering can be precluded by the conscientious adherence of state legislatures to judicially manageable standards, such as the proposed model standards for redistricting in Appendix A *infra*. The Court could stipulate that the preparation of redistricting plans in compliance with the proposed (or substantially similar)

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[23]See *Baker v. Carr*, 369 U. S. at 324-325, note 148; Quinn, *op. cit.*, pp. 62-79, 106-113, and 123-126 of the section "All Passion Spent: California's 1981-1984 Reapportionment"; *Badham v. Eu*, 488 U. S. 1024, Appellants' Brief to the U. S. Supreme Court, No. 87-1818 (May 4, 1988), note 1, pp. 3-4; Gordon E. Baker, "Lessons from the 1973 California Masters' Plan", *Political Gerrymandering and the Courts*, Bernard Grofman, ed. (Agathon Press, 1990), pp. 308-309; Bernard Grofman, "Would Vince Lombardi Have Been Right If He Had Said: 'When It Comes to Redistricting, Race Isn't Everything, It's the *Only* Thing'?", *Cardozo Law Review*, April 1993, Vol. 14, at 1253-1254 (with related notes); and footnote 13 *supra*.

[24]See Quinn, *op. cit.* (particularly, the section "All Passion Spent: California's 1981-1984 Reapportionment"). Also, see 781 F. Supp. at 408-409.

redistricting standards would establish a strong *prima facie* presumption that the plans provided fair and effective representation for the people as required by the Constitution. A substantial burden of proof would be required for plaintiffs to overcome this presumption.

The proposed standards *infra* do not comprise an abstruse political theorem or quixotic ideal divorced from reality, but are field-tested - practical and proven with real-world applications. In the 1970 and 1990 census cycles, due to fortuitous stalemates caused by split control of the state government in California, the state Supreme Court appointed special masters to draw the district lines. Both plans, using near-identical criteria, were based on communities of interest.[25] California has the largest population of any state in the Union, is the third largest in size, and is the most geographically, demographically, and economically diverse, with the most pluralistic society. If these judicially manageable standards can make it there, they can make it anywhere.

The proposed standards also follow closely Justice Stevens' criteria, both procedural and delineational, as discussed throughout his opinion in *Karcher v. Daggett*, 462 U. S. at 744-765. For example, the proposed procedural standards are elaborations of the broad procedural criteria suggested by Justice Stevens (at 759): neutral decision makers, use of neutral criteria, opportunity for input of outside viewpoints, and explanation of guidelines. Justice Powell, in *Davis v. Bandemer*, 478 U.S. at 164-178, restates the same delineation criteria noted by Justice Stevens in *Karcher*.

With judicially manageable standards, redistricting plans, in effect, would be self-evaluated. Currently, judicial

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[25]See *Legislature of State of California v. Reinecke*, 110 Cal. Rptr. 718, and *Wilson v. Eu*, 4 Cal. Rptr. 2d 379. Also, see Quinn, *op. cit.*, pp. 58-75 of the section "Endless Stalemate: California's 1971-1973 Reapportionment". For a recent evaluation of the 1973 plan, see Baker, "Lessons ...", *op. cit.*, p. 296.

reviews are uncertain and always after the fact when plans are challenged in the courts. The damage has already been done to fair and effective representation and democratic institutions for years, often nearly through the decade. As has been said, justice delayed is justice denied.

Gordon E. Baker wrote: "Tortuously shaped districts ... have become the hallmark of gerrymandering because they offend the sense of fair play and the desire for representing some approximation of communities of interest. ... [T]he political branches [could] correct inequities for judicial review, following general guidelines laid down by the Court- for example, proper procedures (public hearings, broad consultation, official justifications of districting plans), adhering to local subdivision boundaries whenever practicable, following traditional (and, often, state constitutional) criteria designed to protect the integrity of geographic regions and communities. ... Those who would leave the problem to the give-and-take of the political process overlook the fact that the process itself often resembles a monopoly more than a free market ... A generation ago the problem of malapportionment in the form of vast population disparities among districts was virtually immune from political remedies for much the same reasons. Until the remaining form of vote dilution is also checked by the judiciary, the reapportionment revolution will remain unfinished."[26] [Emphasis added.]

Following neutral standards of redistricting for fair and effective representation that apply equally to all groups would provide a principled resolution to most collateral issues relating to districting and the electoral system. See Appendix B *infra*. A decision to declare gerrymandering unconstitutional *per se* would not be a reversal of previous "apportionment" and related voting rights decisions - it would transcend them as a fulfillment of their promise and hope of

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[26]Baker, "The Unfinished Reapportionment Revolution", *op. cit.*, pp. 24-25.

fair and effective representation for the people.

VII.

Chief Justice Warren, in *Reynolds v. Sims*, 377 U. S. at 565-566, captured the essence of this issue with his statement that "fair and effective representation for all citizens is concededly the basic aim of legislative apportionment".[27] This ideal of democratic representation could be realized through the Court's declaration that gerrymandering is unconstitutional *per se*, providing judicially manageable standards, which, if followed, would establish a *prima facie* presumption of constitutionality. This straightforward finding would resolve not only the contentious matter of gerrymandering, but would also resolve or mitigate several related issues, as discussed in Appendix B *infra*.

The first three words of the Constitution, **WE THE PEOPLE**, were not writ large without purpose or reason - they were a graphic expression of the pre-eminence of the people in the republic being founded. It is not possible to overestimate the depth of these feelings.[28] Lincoln, in his immortal Gettysburg Address, said that our republic was a "government of the people, by the people, for the people".

It is evident that the people are the supreme authority in our political system and that their common interests take precedence over all others, with no deference given to those contrary. Hamilton wrote (*ibid.* No. 59, pp. 400-401) that there is "an obvious distinction between the interest of the people in the public felicity, and the interest of their local rulers in the power and consequence of their offices ... [who are] stimulated by the natural rivalship of power, and by the hopes of personal aggrandizement ... The scheme of separate confederacies which will always multiply the chances of

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[27]See Grofman, *op. cit.*, at 1262, note 102.

[28]See Madison, *The Federalist* No. 45, p. 307 and Hamilton, *op. cit.*, No. 22, p. 144.

ambition, will be a never failing bait to all such influential characters in the State administrations as are capable of preferring their own emolument and advancement to the public weal. ... [The Union's] preservation therefore ought in no case that can be avoided to be committed to the guardianship of any but those whose situation will uniformly beget an immediate interest in the faithful and vigilant performance of the trust."

The diminution, in any manner, of the right to vote strikes at the very heart of republican principles, the constitutional foundation upon which our government is established. The Declaration of Independence stated that "the right of Representation in the Legislature [is] a right inestimable to [the people]". The Court, "bound to pursue [the constitutional] authority", has within its power to restore the right of representation in its full scope to the people, reinvigorating the political process with a renewal of fairness, legitimacy, integrity, and honor.

Democracy, with its sweet winds of freedom, is now sweeping the world, without parallel, such as none would have dared dream only a few years ago. Although relatively young in the family of nations, America has been a lodestar, "the world's best hope",[29] its oldest representative democracy. At a time when the emerging fragile democracies of the world are looking to our political system for hope, guidance, and inspiration, can we do less than what is just and right? "For we must consider that we shall be as a city upon a hill. The eyes of all people are upon us."[30]

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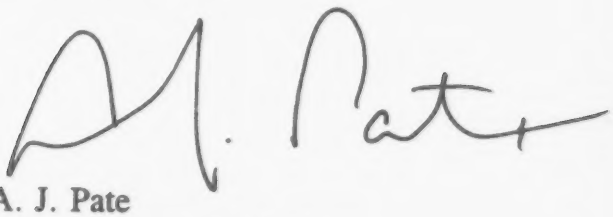
[29]Jefferson's First Inaugural Address, March 4, 1801. *The Writings of Thomas Jefferson*, Saul K. Padover, ed. (The Easton Press, 1967), p. 272.

[30]From a sermon delivered by John Winthrop, first governor of the Massachusetts Bay Colony, in 1630 aboard the *Arbella* enroute to America; Robert C. Winthrop, *Life and Letters of John Winthrop*, Vol. II (Ticknor and Fields, 1867), p. 19. These prophetic words have been fulfilled literally.

Respectfully submitted,



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APPENDIX A

PROPOSED MODEL STANDARDS FOR REDISTRICTING

Procedural Standards

1. The state legislature should appoint a joint redistricting committee, composed of equal numbers of legislators from each major political party to draw the congressional and state legislative districts; a caucus of all legislators from each political party will select their own party's representatives to the committee. The number of committee members should be the minimum sufficient to adequately perform the task, not exceeding ten members. To the extent practicable, the major geographical areas in the state and major minority groups protected under the Voting Rights Act should be represented on the committee.

2. To avoid potential conflicts of interest, all committee members would be barred, as a condition of service, from seeking office in the first election held in a congressional district drawn by a redistricting committee of which the legislator was a member. For example, members of the redistricting committee which drew a plan in 1991 would be barred from seeking election as a U. S. congressman in 1992, but would be eligible thereafter; they would not be barred from other state elections.

3. Before drawing a preliminary plan, public hearings should be held in major cities in appropriate geographic areas of a state to invite public participation in identifying significant communities of interest. The public should be provided explanations of the delineation standards to be used.

4. The committee should produce preliminary plans following the delineation standards (*infra*), then hold additional public hearings, which may be in a single location

(either in a central city or the state capital), before presenting final plans to the state legislature. These preliminary plans should be made available to the media statewide prior to the public hearings.

5. For both preliminary and final plans, the committee must make adequate and appropriate provision for public dissemination of the rationale or other explanation for all districts, particularly regarding the communities of interest encompassed therein. The complexity of the explanations will generally be in inverse proportion to their fairness, *i.e.*, the simpler, the fairer (*veritas simplex oratio est*).

6. Redistricting plans may be submitted at all hearings by the public or other interested parties for consideration by the committee. These plans must meet the following criteria:

a. must be based on the federal census data;
b. must present a complete plan for the entire state for districts of a type;
c. must follow the delineation standards (*infra*); and
d. must provide full explanation and rationale for all districts drawn, particularly regarding communities of interest encompassed therein.

An exception may be made for informational submissions in which lines are drawn solely to identify boundaries of specific communities of interest, with or without regard to population factors. Such submissions, which may or may not be a complete plan, should be clearly labeled as for identification or information purposes only.

7. Adequate and appropriate public notice should be given prior to all hearings. Testimony not related solely to fairness in determining representation for communities of interest is not germane and will be given no consideration.

8. All official committee meetings should be open to the

public, with complete records (including videotape) kept of all proceedings. Census data, computer programs, and other related materials should be available to the media and the public at cost.

9. No favoritism or preferential treatment, either in receiving public testimony or plans, will be granted to officeholders, at any level of state or federal government, including committee members. All testimony or plans must be judged solely on their intrinsic merits.

10. The final plans prepared by the committee require only a simple majority for committee approval.

11. Although not required, final plans prepared by the committee may be submitted to the state legislature for approval, but amendments should require a three-fourths majority and may be justified only for further unifying of communities of interest. However, such plans, fairly drawn in good faith accordance with these standards (both procedural and delineation standards), should not be subject to veto by a governor.

12. Final plans must be completed by the committee within six months from the date of the release of final federal census data. If legislative approval is required, the legislature has thirty days to act after receipt of the plan from the committee, or the plan will become law automatically.

> [Six months should be more than sufficient. After all, despite the primitive transportation and communications of 1787, the Constitutional Convention took less than four months to complete the Constitution, the greatest political document in history!]

13. If for any reason, the process is not completely finalized

within the required time frame, all data collected by the committee will be submitted to the state supreme court which will appoint masters to complete the process within two months in accordance with the delineation standards (*infra*).

14. In states where the legislature has delegated responsibility for redistricting to extra-legislative bodies, such agencies should comply with these procedural standards (with exception of the first two) and all delineation standards (*infra*).

Delineation Standards

1. Districts must conform to constitutional standards of substantially equal population, based on total population as determined decennially by the Federal Census. Deviations from "ideal district population" may not exceed 5.0%± for congressional districts, nor 10.0%± for state districts. Ideal or average district population is calculated by dividing the total state population by the number of districts of a type to be drawn. The demonstrated purpose of such deviations must be the avoidance of dividing communities of interest or counties.

To optimize the opportunity for racial/ethnic minorities to select representatives of their choice, the districts in which they constitute a majority or have a significant numerical minority may contain total population near the lower limit within the permissible range, thus reducing dilution of their vote and providing some offset for the acknowledged undercount of minorities.

2. Districts should be drawn to achieve fair and effective representation for communities of interest (major groups of people with evident common interests). Communities of interest, although not circumscribable with absolute exactitude, are none the less real. These communities may

be based on social, economic, or geographic interests, such as agricultural areas, regions of industry, racial or ethnic communities, etc.

Districts must be drawn for any racial/ethnic minority comprising a community of interest which is geographically compact and has total population sufficient to constitute a majority in such a district; the same requirement should apply to the optimal extent possible for all other communities of interest as well.

Although their population may be insufficient to constitute even an effective "influence district", every practicable effort should be made to keep intact any discrete and insular communities of interest, which are readily identifiable.

> [*E.g.*, see *United Jewish Organizations v. Carey*, 430 U.S. at 181-182, where the Hasidic Jewish community was unnecessarily split between two districts, because of blind adherence (hooked on a "feeling") to a bureaucratic rule-of-thumb, in a triumph of form over substance at its most absurd.]

3. Districts must be composed of contiguous land masses with reasonable access between inhabited areas; however, non-contiguous land masses, separated by a body of water, may be included in the same congressional district if they are within the borders of the same county. No district line may cross any other district line of the same type. If population is insufficient for a separate district, islands should be incorporated into the same districts that contain the political units of which they are part.

4. Districts must be as functionally compact as practicable in encompassing communities of interest, considering transportation and communication links, as well as natural boundaries.

The measure of compactness is not subject to practical precision. However, the following standard will serve as a reasonable guideline to limit non-compactness: When enclosed within a circle, ellipse, or quadrangle (simple quadrilateral) of the shortest possible perimeter, the area of the district must occupy two-thirds or more of the total area enclosed. Certain exceptions may be made to this general rule, as follows:

a. A lower threshold of five-ninths may be used for districts in which no counties are divided, or for districts in which racial/ethnic minorities constitute a majority of the population.
b. For state border districts enclosed within any of the three geometric figures noted above, the area beyond state borders is not included in the equation.
c. For districts contained wholly within a county, the exception noted in "b" may also be applied to county borders.

5. Counties are the basic defining units in forming districts, and the integrity of their boundaries must be preserved to the fullest extent possible. Generally, counties should be divided between districts only when total population of the county exceeds the maximum allowable deviation from ideal district population.

City boundaries should be preserved to the extent practicable, but with lower priority than county lines, particularly at the margins where they are often irregular and/or sparsely-populated. When census tracts are not conterminous with city boundaries, census tracts control. City boundaries may be disregarded when necessary to avoid dividing compact racial/ethnic communities of interest.

Additional criteria must be followed:

a. In general, when considering existing boundaries of political subdivisions, the older the boundary, the more

weight to be given;

b. Lines from the same district cannot cross a common border between two counties more than twice; and

c. Only one district may cross a common border between two counties, except when a crossing line is also a common boundary between two districts (*i.e.*, two districts or more cannot separately cross the same common border).

6. No census tracts may be divided, except in very rare instances which must be fully explained.

7. All congressional and state districts should share common boundaries to the optimal extent possible, especially where there is mathematical symmetry. Congressional districts should be drawn first, and all else follows from those primary lines. For example, assume 30 congressional districts, 30 state senate districts, and 150 state house districts; the congressional and state senate districts should be identical (conterminous), and each congressional district should be subdivided into 5 state house districts ("nested").

8. Neither partisanship nor incumbency can be a consideration or factor under any circumstance. Since districts should be drawn for communities of interest, no consideration may be given to personal interests of any individual or of any group or special interest which is not discrete and insular.

9. Due to the special protections provided racial and ethnic minorities by the Constitution and current federal law, certain additional factors should be considered in conjunction with those mentioned elsewhere in these standards.

When possible, districts for racial/ethnic communities of interest should have a majority of the voting age population, rather than simply a majority of the total population. After

a majority of voting age population (50 to 55%) has been attained, usually with a 65 to 70% majority of total population, the district should not include additional persons of that minority; this is particularly applicable in multi-district metropolitan areas. However, in multi-county districts, the minority may also be part of broader communities of interest beyond race or ethnicity. For example, total population of a racial/ethnic community of interest may range in excess of 70% where that minority is a part of multiple communities of interest and has a substantial majority of population in a particular geographic region (*e.g.*, the Hispanics in south Texas); however, the creation of such districts must not result in a significant dilution of that minority's potential representation on a statewide basis, either in intent or effect.

When sharing a geographically-compact area and the population of each is insufficient for a majority in a separate district, two or more racial/ethnic communities of interest should be combined to form majority or influence districts if they have political affinity or cohesiveness.

10. These standards are interdependent and interrelated. Any conflicts between standards in their application must always be resolved in favor of the standard which, in a particular situation or circumstance, would provide the fairest treatment for affected communities of interest.

11. Any exceptions to these standards may be justified only as rectification of specific inequities or for further enhancement of communities of interest. A good faith effort to comply with the spirit of these standards is required. Any search for loopholes or seeking advantage through artificial or contrived conflicts between standards will be in bad faith, inimical to the best interests of the people.

APPENDIX B

COLLATERAL ISSUES AND RELATED DECISIONS

Population Equality of Districts

Justice Stevens, in *Karcher v. Daggett*, 462 U.S. at 753, wrote: "The major shortcoming of the numerical standard is its failure to take account of other relevant - indeed, more important - criteria relating to the fairness of group participation in the political process. To that extent, it may indeed be counterproductive." [Emphasis added.] Under the proposed standards *supra*, population equality between the districts becomes only one of a number of standards for fair and effective representation. Since the numerical standard would no longer be the sole criterion, permissible deviations from average district population could be relaxed to a more reasonable standard of substantial equality[1] (a "tolerance for reality"[2]), reconciling the principle of one person, one vote with the constitutional right of fair and effective representation.

The one person, one vote standard which evolved into a virtual zero-deviation requirement has been severely criticized and ridiculed. Much of that commentary has come from Justices on the Court. At the start, Justice Frankfurter, in *Baker v. Carr*, 369 U. S. at 268, warned of a "mathematical quagmire". Chief Justice Warren, in *Reynolds v. Sims*, 377 U. S. at 577, wrote: "Mathematical exactness or precision is hardly a workable constitutional requirement." Justice Harlan, in *Kirkpatrick v. Preisler*, 394 U. S. at 550-552,

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[1]Justice White, in *Kirkpatrick v. Preisler*, 394 U. S. at 553, referring to congressional districts, suggested: "As a rule of thumb, a variation between the largest and smallest district of no more than 10% to 15% [a 'trivial level'] would satisfy me ..."

[2]Justice Fortas, *Kirkpatrick v. Preisler*, 394 U. S. at 538.

wrote: "Marching to the nonexistent 'command of Art. I, § 2' of the Constitution, the Court now transforms a political slogan into a constitutional absolute. Straight indeed is the path of the righteous legislator. Slide rule in hand, he must avoid all thought of county lines, local traditions, politics, history, and economics, so as to achieve the magic formula: one man, one vote. ... [I]nsistence on mathematical perfection does not make sense even on its own terms. ... [T]he Court's exclusive concentration upon arithmetic blinds it to the realities of the political process ... The fact of the matter is that the rule of absolute equality is perfectly compatible with 'gerrymandering' of the worst sort. ... [T]he question before us is whether the Constitution requires that mathematics be a substitute for common sense in the art of statecraft." Justice White, in *Kirkpatrick v. Preisler*, 394 U. S. at 555, wrote: "Today's decisions on the one hand require precise adherence to admittedly inexact census figures, and on the other downgrade a restraint on a far greater potential threat to equality of representation, the gerrymander ... I see little merit in such a confusion of priorities." The Court had strained at a gnat, and swallowed a gerrymander.

Zero population deviation is a *reductio ad absurdum*. There is no perfect census; even the Census Bureau has estimated that the total 1990 Census was undercounted by 2.1%, which was not evenly distributed, geographically or demographically. The census was changing even as it was being taken, through births, deaths, and migrations. Districting plans were not drawn until over a year or more after the census, and the first elections under the new plans were not held until two or more years after the census.

When the 1990 district populations by state were determined, there were very large initial deviations in district size, ranging from Wyoming with 453,588 to Montana with 799,065 (both single district states), a variation of 76%; compared to the ideal district population, based on the national average of 572,466, this is a total variance of 60%.

Populations are not static, so there are dramatic shifts

ongoing throughout the decade, both within and between states. From the 1980 Census to the 1990 Census, the total U. S. population increased by almost 10%, which was not evenly distributed, geographically or demographically (*e.g.*, Nevada increased by 50% and West Virginia decreased by 8%). Individual congressional districts had even larger shifts, ranging from an increase of 86% in California District 37 to a decrease of 23% in Michigan District 13. Even within the same state, Texas had a deviation range of 85%, from a 70% increase in District 26 to a 15% decrease in District 18.

All the above data are based on the count of total population, which is appropriate according to the Fourteenth Amendment, Section 2 ("counting the whole number of persons"). However, if the goal of the Court was an absolutely equally-weighted individual vote,[3] then this was arguably the worst basis to use; more logical bases would have been registered voters, voting age population of citizens only, total voting age population, or total citizens. However, voter equality is an impossible and unattainable goal in a republican form of government. For votes to be truly equal in weight, there would have to be an exactly equal turnout of voters in every district in every election. Of course, this is beyond credibility.

The Court has placed an inordinate reliance on such an illogically simplistic and internally contradictory standard. Zero deviation is certainly a bright line - but from where to where? Shifting sand does not make a good foundation for a constitutional standard. How can such precise law be established on such imprecision?

Justice Powell, in *Davis v. Bandemer*, 478 U. S. at 168, wrote: "A standard that judges the constitutionality of a districting plan solely by reference to the doctrine of 'one person, one vote' may cause two detrimental results. First,

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[3]See generally, Jonathan Willis Still, "Voter Equality in Electoral Systems" (unpublished Ph. D. dissertation, Department of Political Science, Yale University, May 1977), especially pp. 113-131.

as a perceived way to avoid litigation, legislative bodies may place undue emphasis on mathematical exactitude, subordinating or ignoring entirely other criteria that bear directly on the fairness of redistricting. Second, as this case illustrates, and as *Reynolds v. Sims* anticipated, exclusive or primary reliance on 'one person, one vote' can betray the constitutional promise of fair and effective representation by enabling a legislature to engage intentionally in clearly discriminatory gerrymandering." [Notes and references omitted.] The warnings of Justice Powell and others have unfortunately been fully realized; extreme adherence to zero deviation has led inexorably to extreme gerrymandering (*summum ius summa iniuria*).

Although Justices have indicated in several decisions that wider variances may be acceptable in conjunction with other neutral criteria,[4] these open invitations have been disdainfully ignored by the legislatures because they delight in exploiting the zero deviation rule which allows them to put a glossy (though very thin) constitutional veneer of legitimacy over their dirty little game of gerrymandering. To avoid reversals, the lower courts have also accepted the status quo, largely due to the failure of the Court to give any direction by laying down appropriate guidelines.

Partisan Gerrymandering / Proportional Representation

In *Davis v. Bandemer*, 478 U. S. 2797, the Court held that "political" (*i.e.*, partisan) gerrymandering[5] under certain

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[4]*E. g.*, 377 U. S. at 578-581 and 462 U. S. at 780-782, 848, and 852. Even Justice Brennan, the most rigid advocate of zero deviation ("precise mathematical equality"), suggested some exceptions in *Karcher v. Daggett*, 462 U. S. at 740 (also see note 6 at 734).

[5]"Political" gerrymandering is a redundant term. All gerrymandering is political, falling into two basic categories - racial/ethnic and partisan. Each has sub-categories: racial/ethnic gerrymandering may be affirmative

conditions may violate the Equal Protection Clause of the Fourteenth Amendment.[6] This decision, virtually self-nullifying, has had absolutely no impact on gerrymandering, which has only grown more extreme in the 1990 cycle. In the seven years following this decision, the Court has not decided a single case under its precedent.

Partisan gerrymandering would no longer be a distinguishable issue, if gerrymandering is declared unconstitutional *per se* and the Court obliges state legislatures to provide fair and effective representation through use of neutral standards. Gerrymandering is not unconstitutional because of the uncertain harm it does to political parties, but because of the real and immediate harm done to the people and their communities of interest. The identification of gerrymanders *per se* is relatively easy and immediate when based on objective standards (such as the proposed standards *supra*), while the identification of "unconstitutional" partisan gerrymanders is very complex and prolonged using highly subjective and ill-defined standards.

Justice O'Connor, in *Davis v. Bandemer*, 478 U. S. at 144, clearly and correctly identified the issue: "I would hold that the partisan gerrymandering claims of major political parties raise a nonjusticiable political question..." [Emphasis added.] It is historically evident that political parties as such were intended no provision in the Constitution - it is the interests of the people which are always paramount. *Davis v. Bandemer* focused on cause and intent, which without question were motivated by partisan interests, but identified the wrong effect. The constitutional violation was the

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or negative, and partisan gerrymandering may be unilateral or bilateral. Often racial/ethnic gerrymandering, in either sub-category, may have partisan overtones as well.

[6]This decision in effect says that political parties have constitutional protections that the people in their communities of interest do not have - which cannot be what the Framers of the Constitution intended.

arbitrary fragmentation of communities of interest, for whatever reason, thereby diluting their votes and depriving them of fair and effective representation. This effect was determinable on the face of the map without need for a results test based on several subsequent elections as required to "prove" a partisan gerrymander.

The results test for partisan (and racial/ethnic as well) gerrymandering raises serious apprehensions of an eventual evolvement to proportional representation. Justice O'Connor (*ibid.*, at 145) warned: "It is predictable that the courts will respond by moving away from the nebulous standard a plurality of the Court fashions today and toward some form of proportional representation for all political groups. The consequences of this shift will be as immense as they are unfortunate. ... [I do not] believe that the proportional representation towards which the Court's expansion of equal protection doctrine will lead is consistent with our history, our traditions, or our political institutions."

The use of neutral, primarily qualitative, districting standards will preclude proportional representation because there would be no results test, prospectively or retroactively. The districts simply would be drawn as fairly as possible in a neutral process, optimizing representation or political influence for as many discrete, insular, and identifiable groups as feasible; then the people would be free to choose whom they will to represent their common interests.

As Justice O'Connor (*ibid.*, at 147) wrote: "[N]o group right to an equal [or proportionate] share of political power was ever intended by the Framers of the Fourteenth Amendment." But what is granted by the Constitution is the right of the people, from whom the "government derives all its power", to fair and effective representation for "the permanent and aggregate interests of the community". The right guaranteed is not based on the results of elections, rather it is based on the procedural fairness of the process which determines the value and effectiveness of the vote and the legitimacy of the representation so chosen.

By declaring gerrymandering unconsitutional *per se* based on neutral standards, the Court will have disengaged itself from the partisan political issues which are obviously inherent in deciding any partisan gerrymandering case. As Justice Frankfurter warned in *Baker v. Carr*, 369 U. S. at 267: "The Court's authority - possessed of neither the purse nor the sword - ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself in the clash of political forces in political settlements."

Creation of Majority and Influence Districts for Racial/Ethnic Minorities

The use of the proposed standards *supra* would obviate most of the voting discrimination complaints of racial/ethnic minorities, which the Voting Rights Act was intended to resolve, with the principal exception of those related to multi-member districts.

In *Thornburg v. Gingles*, 478 U. S. at 50-51, which dealt with multi-member districts but presumably would apply as well to single-member districts,[7] the Court established three "necessary preconditions" for a threshold proof for a racial/ethnic minority that "districts operate to impair [its] ability to elect representatives of their choice": "First, ... must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a ... district[;] ... [s]econd, ... must be able to show that it is politically cohesive[;] ... [t]hird, ... must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate."

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[7]See Opinion of the Court by Justice O'Connor, *Shaw v. Reno*, ___ U. S. ___, 113 S.Ct. at 2831.

Under the proposed standards, the first precondition of *Thornburg* is the only requirement that would need to be met to warrant a district being drawn for a racial/ethnic community of interest, which is the same neutral requirement for all other communities of interest.[8] It would not be necessary for a minority to have to establish the second and third preconditions. Indeed, the proposed standards also go beyond the bare requirements of the Voting Rights Act by the establishment of influence districts where practicable for racial/ethnic minorities and all other applicable groups.[9]

Racial/ethnic minorities have been used shamelessly as pawns by both political parties for purely partisan reasons. The most common form in past cycles was a negative gerrymander, the fragmentation of racial/ethnic communities of interest to maximize Democratic Party control of districts for the protection of white incumbents. In the current cycle, there has been a new phenomenon, affirmative gerrymandering (the most extreme form of gerrymandering yet seen[10]), which fragments non-minority communities of interest to maximize minority districts. What results is simply an agglomeration of a particular minority, which in no sense could be construed as a community itself, yet which by its creation denies the constitutional right of fair and effective representation to its adjoining communities of interest.[11]

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[8]See 808 F. Supp. at 475, citing Justice White in *United Jewish Organizations v. Carey*, 430 U. S. at 168.

[9]See Grofman, *op. cit.*, at 1259, note 86.

[10]See George F. Will, *Restoration* (The Free Press, 1992), pp. 41-50.

[11]"[A] district would not be sufficiently compact if it was so spread out that there was no sense of community, that is, if its members and its representatives could not effectively and efficiently stay in touch with each other; or if it was so convoluted that there was no sense of community, that is, if its members and its representatives could not easily tell who actually lived within the district. Also of importance, of course, is the compactness

This tactic has been strongly aided and abetted by the Republican Party, principally in the hope of depriving white Democratic incumbents of the minority vote, thus making them more vulnerable to defeat.[12] Under the affirmative version, minorities at least get more direct representation, but at a high cost to the integrity of the political system and to non-minority communities of interest.[13] This cynical manipulation of racial/ethnic minorities, as dehumanized votes ("faceless numbers") to be shifted about at will for personal and/or partisan political purposes,[14] is demeaning both to the minorities and to the very process itself.

Justice Stevens, in *Rogers v. Lodge*, 458 U. S. at 651-652, wrote: "Racial consciousness and racial association are not desirable features of our policial system. We all look forward to the day when race *is* an irrelevant factor in the political process. In my opinion, however, that goal will best be achieved by eliminating the vestiges of discrimination that motivate disadvantaged racial and ethnic groups to vote as identifiable units. Whenever identifiable groups in our society are disadvantaged, they will share common political interests and tend to vote as a 'bloc'. In this respect, racial groups are like other political groups. A permanent constitutional rule that treated them differently would, in my opinion, itself tend to perpetuate race as a feature distinct from all others; a trait that makes persons different in the

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of neighboring districts; obviously, if, because of the configuration of a district, its neighboring districts so lacked compactness that they could not be effectively represented, the *Thornburg* standard of compactness would not be met." 686 F. Supp. at 1466.

[12]See Grofman, *op. cit.*, at p. 1251.

[13]Such extreme actions may also be detrimental to the best interests of the minority; see 899 F. 2d at 1038-1039.

[14]See Justice White, *Shaw v. Reno*, ___ U. S. ___, 113 S. Ct. at 2841-2842, note 10.

eyes of the law. Such a rule would delay - rather than advance - the goal advocated by Justice Douglas: 'When racial or religious lines are drawn by the State, the multiracial, multireligious communities that our Constitution seeks to weld together as one become separatist; antagonisms that relate to race or to religion rather than to political issues are generated; communities seek not the best representative but the best racial or religious partisan. Since that system is at war with the democratic ideal it should find no footing here. '*Wright v. Rockefeller*, 376 U. S. 52, 67 ... '" [Emphasis in original.] Also, see 740 F. Supp. at 625-626, part IV.

Fair and effective minority representation determined by a neutral process is an issue which needs to be resolved definitively and decisively. Much mischief and harm in terms of racial/ethnic divisiveness and antagonisms have already been done. But there is potential for even greater mischief to our republican form of government and further ripping of the social fabric if this issue continues to drift irresolutely.

Retrogression of Racial/Ethnic Minority Districts

Under Section 5 of the Voting Rights Act, for certain covered jurisdictions, any proposed electoral changes, including redistricting, must be precleared by specified means. The purpose of such preclearance is to assure that a proposed change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color [or language]".

The Court has developed a retrogression test to measure the effects of such changes. Justice Stewart, in the Opinion of the Court, *Beer v. United States*, 425 U. S. at 141, wrote: "[T]he purpose of Section 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."

Although neither the statutory language nor the Court so

states, this effects test is sometimes construed to be an absolute rule against a decline in potential minority representation[15] (*i.e.*, once a minority-majority district has been created, it can never cease to exist). This fallacy has been used to justify extreme and preposterous gerrymanders.[16] Under the proposed neutral standards *supra*, redistricting for minority interests will meet both the greater constitutional protections of the Fourteenth Amendment and the statutory requirements of the Voting Rights Act.[17] They provide a neutral rationale for the eventuality of a decline in potential minority representation. Minorities may lose their majority status in a district (or geographic area) due to substantial emigration of their members into the majority community or other communities of interest or by the immigration into the district of members of other communities of interest, often a different minority.

Such declines are a reality. In the decade concluding with the 1990 Census, the four congressional districts which lost the most population were all represented by blacks; of the districts losing 10% population or more during the decade, ten out of fourteen (over 70%) had black representatives.

These migrations may be a democratic trend toward

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[15]Concerning the difficulty in making such a determination, see Justice Marshall's comments in *Beer v. United States*, 425 U. S. at 153, note 12.

[16]See the Opinion of the Court by Justice O'Connor, *Shaw v. Reno*, ___ U. S. ___, 113 S. Ct. at 2831. In Title 28 of the Code of Federal Regulations (7-1-92 Edition), Part 51, p. 822, the Procedures for the Administration of Section 5 of the Voting Rights Act include among factors to be considered by the Attorney General the following: Sec. 51.59(f) "The extent to which the plan departs from objective redistricting criteria set by the submitting jurisdiction, ignores other relevant factors such as compactness and contiguity, or displays a configuration that inexplicably disregards available natural or artificial boundaries."

[17]See Justice Marshall's opinion (part I, section B), 425 U. S. at 156-158.

increasing assimilation. The political goal of a pluralistic society should be that particular racial/ethnic interests ultimately become indistinguishable from those interests shared with other members of their community.

Other Issues

The impact of the proposed standards *supra* on two other peripheral issues should be noted - incumbency and competitive districts - although these are partisan political questions, neither of constitutional concern except to the extent by which the political process is unfairly distorted to assure or attempt to assure non-competitive districts or the continued reelection of incumbents.[18] Constitutional issues should be based on principles and standards more enduring than transitory partisan loyalties.

Communities of interest evolve slowly, if at all. The long-term effect of adherence to neutral districting standards would be relatively stable district lines, at least at the core. Future population shifts would generally require adjustments only at the margins, contrasted to the current wildly-polymorphic boundaries from decade to decade. Ironically, though the proposed standards disregard incumbency, this stability should benefit incumbents, at least in terms of residency; it should be a very rare event when two incumbents were paired in the same new district, other than when the total number of districts of a type are being reduced.

The requirement of the proposed standards for the optimal use of conterminous boundaries and nesting of different types

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[18]It is ironic that the Court's decisions have had the unintended consequence of establishing a *de facto* safe harbor rule for incumbents (effectively creating a right to tenured office) through unrestricted gerrymandering and an acceptance of incumbency-protection as a justifiable state policy, contrary to the interests of the people, while an outraged electorate is fueling a rapidly growing grass roots effort to limit terms in Congress and other elective offices. See generally Will, *op. cit.*

of districts should increase upward mobility of politicians and thus competitiveness ("the rivalship of power"[19]). Coherent functionally-compact districts are certainly more capable of becoming competitive than fragmented artificial districts. Elections will be considerably more responsive to broad political shifts within communities of interest.[20] Representation will be enhanced by competition over who will best represent the interests of the community; whether inter-party or intra-party is of no constitutional consequence.

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[19]Hamilton, *The Federalist* No. 84, pp. 579-580. The inference could be drawn that the benefits of conterminous or nested districts were anticipated, based on the assumption that counties would be the basic unit for districting.

[20]See Baker, "Lessons ...", *op. cit.*, pp. 302-305, and Quinn, *op. cit.*, pp. 62-75 of the section "Endless Stalemate: California's 1971-1973 Reapportionment".